83 - 1817

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

WILLIAM HARKINS, et al.
Petitioners

vs.

INTERSTATE MOTOR FREIGHT SYSTEMS, et al.
Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

PAUL H. TOBIAS
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Attorney for Petitioners

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SUPREME COURT of the UNITED STATES

Term October, 1983

No. - - - - -

WILLIAM HARKINS, et al., Petitioners

vs.

INTERSTATE MOTOR FREIGHT SYSTEMS, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

To the Honorable Chief Justice and the Honorable Associates Justices of the Supreme Court of the United States:

Petitioners William Harkins, et al. pray that a writ of certiorari issue to review the judgment of the United State Court of Appeals for the Sixth Circuit, entered on January 5, 1984, Case Nos. 82-3188 and 82-3392 on the docket of that Court.

QUESTION PRESENTED

Should the decision in DelCostello v. I.B.T., 103 S.Ct. 2281 (1983), be prospective only or be retroactively applied?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioners: William Harkins, Jack Stamey and William R. Calhoun, (who will hereinafter be referred to collectively as "Petitioners"); and Respondents: Interstate Motor Freight System, Local Union #100, Joseph Carlotta, Dallas Barnes, Jack O'Banion and Bud Davis (hereinafter referred to collectively as "Respondents").

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APPENDIX

CITATIONS

OTHER AUTHORITIES

SUPREME COURT of the UNITED STATES

Term October, 1983
No.------

WILLIAM HARKINS, et al., Petitioners

vs.

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Respondents

PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Sixth Circuit

To the Honorable Supreme Court of the United States of America:

Petitioner respectfully petitions this Honorable Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review a judgment of that Court which affirmed an order of the United States District Court, Southern District of Ohio, Western Division, sustaining the Respondents' motion for summary judgment. In its behalf, Petitioners show unto this Court:

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit, dated January 5, 1984, is attached hereto at Appendix A. The order of the United States Court of Appeals for the Sixth Circuit, dated June 13, 1983, is attached hereto at Appendix B. The order and

opinions of the United States District Court for the Southern District of Ohio, Western Division, filed February 8, 1982, and March 8, 1982, are attached hereto as Appendix C and D.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The decision sought to be reviewed is that of the United States Court of Appeals for the Sixth Circuit, dated June 13, 1983, and the order of that Court, dated January 5, 1984.

The statutory provision believed to confer jurisdiction on this Court to review the judgment below by writ of certiorari is Section 1254 of Title 28 U.S.C.A., which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

QUESTION PRESENTED FOR REVIEW

Should the DelCostello decision be prospective only or be retroactively applied?

STATEMENT OF THE CASE

This was an action for breach of contract and for unfair representation, filed on May 1, 1975. Plaintiffs alleged that Defendant Interstate breached the National Master Freight Agreement in October, 1973, causing Plaintiffs to be terminated. The original complaint also alleged that Defendant Local 100 Teamsters Union failed to provide adequate representation with respect to joint committee hearings held in 1973, 1974 and 1975 and was engaged in a pattern of unfair representation with respect to Plaintiffs' efforts to obtain reinstatement and back pay. In September 1977, Plaintiffs amended the complaint. They alleged additional and related breach of contract claims and unfair representation concerning December 1976 grievance hearings.

During the period May 1975 - September 1977, the applicable statute of limitations for 301-DFR suits was lengthy -- in excess of four years. The Sixth Circuit, in Gray vs. International Association, 416 F_{2d} 313 (6th Cir. 1969), approved the application of a six year Kentucky statute in an unfair representation case against a union. In Ohio there were two cases where the Court ruled that a lengthy statute applied: Devries vs. Interstate Motor Freight System, 91 LRRM 2765 (N.D. of Ohio, January 7, 1976); Dill vs. Wood Shovel & Tool Co., 68 L.C. 12,685 (S.D. of Ohio 1972). 1/

Plaintiffs' attorney Bazell justifiably relied upon a lengthy limitation period at the time (1975 and 1977) when the complaints were filed. His affidavit states:

> ". . .2. At the time and during the time I represented Plaintiffs it was my opinion that the Statute of Limitations for 301 suits for breach of contract against the employer was in excess of two years.

1/ The rule of thses cases was reaffirmed by the Sixth Circuit in Smart v. Ellis Trucking Co., 580 F_{2d} 215 (6th Cir. 1978).

3. I knew of no trend of cases or weight of authority holding that suit against Interstate would have to be filed within 90 days or within the period used for suits to vacate an arbitration award.

4. I relied upon my belief that a contract or tort statute of limitations applied in determining when the deadline was for filing claims of Plaintiffs against Interstate."

In United Parcel Service, Inc., vs. Mitchell, 101 S.Ct. (1981), this Court dramatically changed the law by holding that the most analogous and therefore most applicable statute of limitations was a very short state statute governing actions to vacate arbitration awards.

In late July 1981, about one year after petition for certiorari was filed in Mitchell and six years after suit had been filed, Defendants moved to amend their answers to add the statute of limitations as a defense. The District Court permitted

the amendments and subsequently dismissed the complaint based upon Mitchell (Appendix C.).

On June 13, 1983, the United States Court of Appeals for the Sixth Circuit issued its Order affirming the District Court's dismissal. (Appendix B.)

On June 8, 1983, this Court in Del Costello vs. International Brotherhood of Teamsters, 103 S.Ct. 2281 held that a six month federal statute governs 301-DFR actions.

On January 5, 1984, the Sixth Circuit issued an order concluding that DelCostello did not affect the validity of its June 13, 1983 order, dismissing the instant case. (Appendix A). It is this decision which Petitioners now seek to bring before this Honorable Court for its review.

HOW FEDERAL QUESTIONS WERE RAISED

Federal questions herein were raised in the briefs in the United States Court of Appeals for the Sixth Circuit.

ARGUMENT: AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. The Lower Court Erred In Its Cursory Dismissal Of This Case Disregarding The Standards, Set Forth by This Court In Chevron Oil Vs. Huson, For Determining When A Statute Of Limitations May Be Given Retroactive Effect.

In Chevron Oil vs. Huson, 404 U.S. 97 (1971), this Court set out a three part test to be followed in determining when a decision should be denied retroactive application:

> "First, the decision to be applied nonretroactivily must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . Secondly, it has been stressed that 'we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation' . . . Finally, we have weighed the inequity imposed by retroactive

> application, for 'where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." at 106-107 (cites omitted).

As in Chevron, equity demands the nonretroactive application of DelCostello vs. International Brotherhood of Teamsters, 462 U.S.___,103 S.Ct. 2281 (1983) Here, the original complaint was filed in May 1975. Then the Circuit Courts of Appeal of this nation had unanimously ruled that in 301-DFR suits[1], the applicable statutes of limitations were lengthy contract and tort

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[1] The phrase "301-DFR" refers to a breach of contract suit brought under Section 301 of the Act against an employer joined with a suit against a union for unfair representation.

statutes.[1] Thus, Petitioners justifiably relied upon the law as it was at that time. United Parcel Service vs. Mitchell, 457 U.S. 56, 101 S.Ct. 1559 (1981), which drastically shortened the applicable statute of limitations was not decided until 1981, six years after the instant action was filed.

DelCostello was decided shortly after Mitchell and overruled Mitchell by applying the six month statute of limitations period of Section 10(b) of N.L.R.A. [29 U.S.C. Section 160(b)].

Like the plaintiff in Chevron, Petitioners did the utmost possible to protect their rights.

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[1]For a perspective of the decisional law as of the time Petitioners filed their complaint, see 44 George Washington Law Review, 418,424 n. 40-42 (1976).

> "We should not indulge in the fiction that the law now announced has always been the law and therefore, that those who did not avail themselves of it waived their rights." Chevron at 107.

In the instant case, the Sixth Circuit summarily dismissed the complaint by retroactively applying Mitchell and DelCostello. There was no discussion as to the appropriatness of the retroactive application of DelCostello. (See Appendix A), contrary to Chevron, which requires a case by case determination applying the three controlling factors.

The decision below is also in conflict with other Sixth Circuit decisions rendered on this issue. Pitts vs. Frito Lay, 700 F_{2d} 330 (6th Cir. 1983), held that Badon vs. General Motors Corp., 679 F_{2d} (6th Cir. 1982), which applied the limitations period of Section 10(b), should be given prospective effect only.

In LaBond vs. McLean Trucking Co., Case No. 82-1576 (6th Cir. August 15, 1983), (See Appendix E), the Sixth Circuit, relying upon its decision in Pitts held that the DelCostello rule should not be applied retroactively.

DelCostello overruled clear past precedent. As the Court of Appeals for the Ninth Circuit observed in McNaughton vs. Dillingham Corp., 99 LC 10,688 (9th Cir. 1984):

> ". . . it is difficult to state that plaintiffs should have anticipated that the Supreme Court would borrow a federal statute of limitations. Even the Supreme Court in DelCostello notes that such a procedure is unusual." 76 L.Ed$_{2d}$ at 485,495 at 20,332.

When Petitioners filed their action, all of the Circuit Courts were applying lengthy statute of limitations periods

based upon state law[1]. No case law, at that time, discussed the application of a short statute of limitations period borrowed from federal law.

The second factor of Chevron is whether retroactive application will further or retard the operation of the new rule. The purpose of the DelCostello rule is the rapid resolution of labor disputes. Prospective application of this rule will fulfill its purpose by requiring plaintiffs generally to bring their 301 suits within a short period of time after conclusion of their grievance process. Retroactive application of DelCostello will deprive plaintiffs of any judicial remedy, based

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[1]Although there was confusion in the Circuit Courts at the time, the confusion centered around which state law was most analogous, i.e. tort or contract limitation periods. The Circuits, however, were in accord in applying state statute of limitation periods exceeding two years and not applying statutes of only a few months duration.

upon an unforeseeable, superceding and brand new doctrine.[1] Denying plaintiffs, who have been diligent, of "their day in Court" was not one of the purposes of the DelCostello rule.

Retroactive application of DelCostello will produce substantial inequitable results. The instant case had been pending for approximately six years before the statute of limitations defense was even raised. Petitioners expended a tremendous amount of time, energy and money. It would be grossly unfair to hold that Petitioners:

> ". . . slept on his rights at a time when he could not have known the time limitations that the law imposed upon him." Chevron, supra at 108.

Thus, each of the Chevron factors weighs heavily in Petitioners' favor.

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[1] In addition, dismissal of this case will retard the salutatory basic purpose of the law favoring 301-DFR suits where there has been a gross injustice, as was the case herein.

II. A Writ Of Certiorari Is Necessary To Resolve The Conflicts That Exist Among The Circuit Courts And Within The Sixth Circuit As To The Issue Of The Retroactivity Of DelCostello.

The Third Circuit in Perez vs. Dana Corp., 718 F_{2d} 581 (3rd Cir. 1983), the Fifth Circuit in Edwards vs. Sea-Land Service, Inc., 720 F_{2d} 857 (5th Cir. 1983) the Eleventh Circuit in Rogers vs. Lockhead-Georgia Co., 720 F_{2d} 1247 (11th Cir. 1983) and the Eigth Circuit in Lincoln vs. District 9, I.A.M., 99 LC 10,665 (8th Cir. 1983), all have approved retroactive application of DelCostello.

The Sixth Circuit in the instant case and in Curtis vs. Teamsters, Local 299,[1] has issued conflicting decisions. See LaBond vs. McClean Trucking Co., Case No. 82-1576 (6th Cir. 1983) and Pitts vs. Frito Lay, Inc., 700 F_{2d} 330 (6th Cir. 1983).

[1] 716 F_2 360 (6th Cir. 1983).

The Ninth Circuit in Edwards vs. Teamsters Local Union 36, 719 F_{2d} 1036 (9th Cir. 1983) and more recently in McNaughton vs. Dillingham Corp., 99 LC 10,688 (9th Cir. 1984) and Reyes Barina vs. Gulf Trading & Transporation Co., 100 LC 10,821 (9th Cir. 1984), has refused to apply DelCostello retroactively based upon the Chevron analysis.

Also, using the test articulated in Chevron, a number of Courts have refused to give the earlier Mitchell decision retroactive application: Kennard vs. United States Postal Service, Inc., 531 F.Supp. 1139 (E.D. of Mich. 1982); Engelsburg vs. Transcon Lines, 530 F.Supp. 628 (W.D. of Wash. 1982); Tally vs. U.S. Postal Service, 532 F.Supp. 786 (D. of Minn. 1982); Singer vs. Flying Tiger Line, Inc., 652 F_{2d} 1349 (9th Cir. 1981) and McFarland vs. International Brotherhood of Teamsters, 535 F.Supp. 970 (N.D. of Texas 1982).

This Court, in DelCostello, did not address the retroactivity issue. The Circuit Courts are divided amongst themselves and within themselves on this issue, resulting in confusion and inconsistent decisions, and for this reason alone, the writ should be granted.

CONCLUSION

The Court below disregarded the rule of Chevron Oil vs. Huson, causing an inequitable dismissal of the claim on the eve of trial, after seven long years of expensive litigation.

Each of the Chevron factors favor Petitioners. DelCostello established a new unpredicted rule of law. Prospective only application of DelCostello will further the purposes of the rule. Petitioners justifiably relied upon a lengthy statute of limitations. It would be unconscionable to destroy their reasonable expectations. Retroactive application would deny Petitioners their "day in Court" and produce a gross injustice.

The decisions of the Courts of Appeals vary. Conflicting decisions are issuing from within the Sixth Circuit. Therefore, review on certiorari is necessary.

PRAYER

For the foregoing reasons, Petitioners pray that a writ of certiorari issue directed to the United States Court of Appeals for the Sixth Circuit in this case to the end that the order of that Court and the order of the United States District Court, for the Southern District of Ohio, Western Division, may be reviewed by this Court and reversed and remanded with direction that the motion for summary judgment be denied and that the matter proceed to trial.

Respectfully submitted,

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Attorney for Petitioners

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Cincinnati 45208

Of Counsel

AFFIDAVIT OF SERVICE

STATE OF OHIO)
) SS
HAMILTON COUNTY)

I, PAUL H. TOBIAS, after first being duly sworn according to law, do hereby certify that three (3) copies of the foregoing Petition have been deposited in a United States mailbox with first class postage prepaid on this _____ day of April, 1984 and sent to Robert J. Hollingsworth, counsel for Respondent, Cors, Bassett, Kohlhepp, Halloran & Moran, 1700 Carew Tower, Cincinnati, Ohio 45202; and Mark Alan Greenberger, counsel for Respondents, Local 100, Freiberg, Katz & Greenberger, Suite 1400, 105 East Fourth Street, Cincinnati, Ohio 45202, with three (3) copies of this Petition for each of the aforementioned counsel.

PAUL H. TOBIAS
Attorney for
Petitioners

SWORN TO AND SUBSCRIBED in my presence on this 2nd day of April, 1984.

Notary Public

MARVIN KRAUS

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APPENDIX

APPENDIX A

Nos. 82-3188 & 82-3392
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM HARKINS, et al. Plaintiffs-Appellants vs. INTERSTATE MOTOR FREIGHT SYSTEM, INC., et al. Defendants-Appellees	)	ORDER

Before: EDWARDS and ENGEL, Circuit Judges, and NEESE,* Senior District Judge.

On receipt and consideration of letter briefs in the above-styled case submitted by all parties on the effect, if any, of the decision of the Supreme Court of the United States in DelCostello v. Int'l Brotherhood of Teamsters, 51 U.S.L.W. 4693 (U.S. June 8, 1983), ____U.S.____ (1983), this court concludes that the

* Honorable C.G. Neese, Senior District Judge for the United States District Court for the Eastern District of Tennessee, sitting by designation.

DelCostello case does not affect the validity of this court's June 13, 1983, order dismissing the Harkins, et al. appeal. Hence, the June 14, 1983, order vacating the June 13, 1983, order was improvidently issued.

We therefore vacate said June 14, 1983, order and hereby reinstate this court's order of June 13, 1983, in said appeal.

Entered by order of the Court

_____

Clerk

APPENDIX B

82-3188
82-3392

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM HARKINS, et al.	)	
	)	
Plaintiffs-Appellants	)	
	)	
v.	)	ORDER
	)	
INTERSTATE MOTOR FREIGHT SYSTEM, INC., et al.	)	
	)	
Defendants-Appellees	)	

Before: EDWARDS, Chief Circuit Judge, ENGEL, Circuit Judge and NEESE,* Senior District Judge.

This is an appeal from summary judgment entered against certain teamster union members who had brought § 301

*Honorable C.G. Neese, Senior District Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

actions, claiming breach of duty of fair representation by Teamsters Local 100. The summary judgment entered by Judge David Porter, U.S. District Court for the Southern District of Ohio, followed the United States Supreme Court's decision in United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). In that case, the Supreme Court held that the statute of limitations most appropriate to actions for breach of fair representation was the state statute governing motions to vacate an arbitration award. It is conceded that the applicable Ohio statute of limitations is Ohio Rev. Code Ann. §2711.13 (pages 1981) which provides: "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest...."

In this appeal, appellants contend that this much delayed litigation should be exempted from the time bar of the Mitchell decision either because Mitchell should not be considered retroactive under the facts of this case or because the statute should be tolled on equitable grounds.

Our review of the record does not disclose equitable grounds for the tolling of the statute. We find no representation or inducement to delay on the part of defendant and note considerable delay in the processing of this case which was chargeable to the plaintiffs. Further, this Circuit has held that retroactive application of the United States Supreme Court's decision in Mitchell is appropriate. Lawson v. Truck Drivers, Chauffeurs & Helpers, Local Union 100, 698 F.2d 250 (6th Cir. 1983); Badon v. General Motors

Corp., 679 F.2d 93, 97 (6th Cir. 1982).

For these reasons and for those set forth in the opinion of the District Court previously cited, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX C

1/29/82 Filed 2/8/82

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

WILLIAM HARKINS, et al.	)	Case No. C-1-75-155
Plaintiffs,	)	
v.	)	ORDER
INTERSTATE MOTOR FREIGHT INC., et al.,	)	
Defendants,	)	

PORTER, S.J.:

This action pursuant to 29 U.S.C. §185 (N.L.R.A. §301) for alleged breach of collective bargaining agreement and breach of the duty of fair representation, is presently before the Court on Defendants' motions to dismiss the action as barred by the statute of limitations (docs. 168, 171). These motions are the subject of

supporting, opposing and reply memoranda (docs. 168, 170, 171, 174, 175). They were also the subject of a hearing, on oral arguments, held on September 28, 1981.

Although these motions are labelled motions to dismiss, the Court has treated as motions for summary judgment, examining the documents and exhibits of record that are relevant to this motion. Plaintiffs were aware of the depositions, exhibits and affidavits relied upon by the defendants in their motions, and were given every reasonable opportunity to present materials to the contrary. Nevertheless, plaintiffs have disputed none of the material facts set forth in the documents presented by the defendants.

For the reasons set forth in an opinion filed concurrently herewith, the Clerk is hereby instructed to enter judgment in

favor of defendants and against plaintiffs on all claims.

So Ordered.

United States Senior District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISON

WILLIAM HARKINS, et al., Plaintiffs, v. INTERSTATE MOTOR FREIGHT INC., et al., Defendants.	CASE NO.C-1-75-155 O P I N I O N

PORTER, S.J.:

This is an action pursuant to 29 U.S.C. §185 (NLRA §301) for alleged breaches of a collective bargaining agreement by defendant Interstate Motor Freight System, Inc. (Interstate) and breach of the duty of fair representation by defendant Teamsters Local 100. Plaintiffs bring this action on behalf of themselves and other present or former road drivers of Interstate in Cincinnati who were laid off by Interstate in 1973-1974. Plaintiffs allege that Interstate, following its acquisition of

the Great Lakes Express (GLC) southern operating rights on October 13, 1973, breached the National Master Freight Agreement (NMFA) by cancelling the GLX work rules and by refusing to dovetail the seniority of all Interstate road drivers in the Central States area. Certain of the individual plaintiffs, assert that Interstate also breached the contract by refusing to allow them to transfer to other terminals, in the Central State Area, on the basis of their seniority. Plaintiffs further allege that Local 100 unfairly represented them in connection with their grievances over Interstate's alleged contract violations.

This matter is presently before the Court on defendants' motions to dismiss the action as barred by the statute of limitations (docs. 168, 170, 171, 174, 175). They were also the subject of a

hearing, on oral arguments, held on September 28, 1981.

As motions to dismiss, defendants' motions are too late because they were filed after defendants' answers. Fed. R. Civ. P. 12(b). Nevertheless, defendants' motions could be raised by a motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c); and, because they present matters outside the pleadings, they shall be treated as motions for summary judgment. See Fed. R. Civ. P. 12 (c), 56. Plaintiffs were aware of the depositions, exhibits and affidavits presented by the defendants, and had every reasonable opportunity to present contrary evidence. They have disputed none of these, apparently assuming that if United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) applies their claims would be barred. The Court has examined all of the depositions,

affidavits and exhibits of record that appear to be relevant to this motion, and has determined that there is no genuine issue as to any fact set forth herein.

For statute of limitations purposes, this action must be viewed as one to vacta a number of arbitration-like decisions of union-employer joint grievance panels. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981). In Mitchell, the Supreme Court held that the statute of limitations most appropriate to actions such as the one at bar is the state statute governing motions to vacate an arbitration award. 451 U.A. at ___, 67 L.Ed. 2d 732,740. Ohio Revised Code §2711.13, provides that "notice of a motion to vacate, modify or correct an award must be served upon the adverse party or his attorney within three months after the award is delivered to the parties in interest . . ."

Because the issues in this case were first raised individually in a number of separate grievances, which were decided at different times, we must consider each issue separately. We shall consider them in the order in which they are set forth in this Court's Opinion of April 14, 1978 regarding class certification (doc. 85).

The first issue set forth in the Court's Opinion on class certification was the issue of right to transfer. Although this issue was not certified for class treatment, the parties now appear to agree that the individual named plaintiffs are among those with standing to raise this issue. See document 169. Accordingly, we must consider whether the individual plaintiffs are barred from asserting this claim by the statute of limitations. It is disputed that the question of whether laid-off Cincinnati drivers had a right to transfer to other Interstate terminals ahead of new hires was first raised in the Dimmick and

and Beasley grievances. These grievances were heard by the Ohio Joint State Committee as Case No. R-1153-4, and were denied on July 17, 1974. See Young deposition exhibits 41-43. The Dimmick and Beasley grievances, including the issue of right to transfer, were one subject of plaintiffs' initial complaint. Because that complaint was not filed until May 1, 1975 -- more than nine months after the grievance decision -- the right to transfer issue is barred by the statute of limitations.

The second issue set forth in the Court's class certification opinion is the dispute over work rules.

> Briefly stated this issue concerns the applicability of the work rules (primarily method of dispatch rules) previously negotiated between the union and Great Lakes Express to the defendant Interstate following Interstate's temporary acquisition of Great Lakes' southern operating rights in the Central States Area . . .

> Under the Great Lakes method of dispatch, drivers stationed north of Cincinnati would have to use Cincinnati drivers on runs south of Cincinnati.

(doc. 85 at 12). Plaintiffs allege that defendant Interstate in violation of the NMFA

> unilaterally abrogated and cancelled the work rules and practices which had been negotiated between the union and Great Lakes, and refused to recognize the continuing validity of, or to abide by any of, the collective bargaining agreements between the union and Great Lakes . . . [including] the January 24, 1972 decision of the Joint Conference Change of Operations Committee which had assigned to the Great Lakes over-the-road drivers domiciled in Cincinnati the runs to destinations south of Cincinnati . . .

(doc. 77, ¶ 16(a)(b)). Plaintiffs specifically challenged defendant Interstate's practice of dispatching freight from its northern terminals to points south of Cincinnati without the use of Cincinnati drivers (doc. 85 at 12). This practice is commonly referred to as running overhead of Cincinnati.

Interstate's practice of running overhead of Cincinnati was the subject of a number of grievances -- including that of plaintiff Harkins and that of plaintiff Stamey -- that were heard by the Ohio Joint State Committee in consolidated hearings on cases numbered R-97-4 and R-203-4 through R-211-4. These grievances were denied on January 9, 1974, over 15 months before this action was commenced. See Young deposition exhibits 26-34. Accordingly, plaintiffs' challenge to the practice of running overhead of Cincinnati is barred by the statute of limitations.[1/]

1/ New dispatch rules have been established as the result of a grievance proceeding ordered by this Court in a related action. Interstate Motor Freight System v. Truck Drivers Local 100, Case No. C-1-74-117 (doc. 12, April 18, 1974). Although plaintiffs' prayer for relief requests reinstatement of the Great Lakes work rules, it does so only "unless changed through collective bargaining and in accordance with the requirements of the national and supplemental agreements ..." (doc. 77 at 9).

Nowhere in plaintiffs' supplemental and amended complaint is any challenge made to the validity of the grievance proceedings in which the new work rules were established. Moreover, those proceedings culminated on June 20, 1974 in the decision of a subcommittee of the Central States Joint Area Committee. See Young deposition, exhibit 22. A challenge to that decision would have been barred on the date the original complaint was filed.

As set forth in the Court's class certification opinion, the third issue involved in this case is

> plaintiffs' claim that defendant Interstate violated the provisions of the NMFA and its supplemental agreements by not dovetailing the seniority lists of all Interstate road drivers in the Central States Area following the October 14, 1973 takeover of Great Lakes' operating rights and that this alleged violation 'denied the seniority rights to which [plaintiffs] are entitled' and resulted in 'substantial loss of earnings as well as vacation, pension, insurance and other benefits and rights' under the contracts (plaintiffs' amended and supplemental complaint, ¶ 13,14, 16(C) 28, (2), (4)).
>
> (doc. 85 at 18 (footnote omitted)).

The issue of seniority dovetailing was involved in an application submitted to the Ohio State Joint Committee by Great Lakes Express and defendant Interstate for approval of the dovetailing of former Great Lakes employees into the Interstate System Cincinnati seniority list. See Young Deposition, exhibits 37-40. This application was "approved as implemented." Id. Nevertheless, it does not appear from the record presently before the Court whether the precise issue of systemwide dovetailing was raised in the hearing of that application. If it was, then a challenge to that decision of the Ohio State Joint Committee would be barred by the statute of limitations. It appears, however, that the issue of dovetailing into a master seniority list was not raised in any grievance proceeding until that of plaintiff Calhoun which was assigned Case No. R-572-5H before the Ohio

Joint State Committee. This grievance together with a number of other grievances was ultimately decided by the Central States Joint Area Committee as Case No. 592, and was denied on December 16, 1976. Young Affidavit, ¶60 and Exhibit 13.[2/]

Because the Calhoun grievance raising the issue of systemwide dovetailing was decided after the initial complaint and the amended complaint (docs. 1 and 3) were filed, it is necessary to determine whether the allegations regarding this grievance relate back to the commencement of this action. In the circumstances of this case, this is a difficult issue.

2/ This grievance was denied "as previously heard and denied" although it does not appear in the record that this grievance had previously been decided.

First of all, it is clear from defendant Interstate's reply memorandum that defendants were aware that plaintiffs intended to press a claim for unfair representation in the grievances decided December 16, 1976 even before the hearing and decision of the Joint Area Committee had occurred. It is also clear that defendants objected at all times to inclusion of that issue in this lawsuit without an appropriate amendment of the plaintiff's complaint (doc. 174 at 7-97).

Furthermore, the Court disagrees with defendants' argument that supplemental pleadings can never relate back to the date of the initial complaint. See 6 C. Wright & A. Miller, § 1496 at 484-85 and cases cited there; 3 Moore's Federal Practice, ¶ 15.16[2]. Nevertheless, neither an amendment nor a supplement to a complaint that raises an entirely different transaction will relate back. Pursuant to

Fed. R. Civ. P. 15(C), the Court must determine whether there is a common core of operative facts in plaintiffs' original complaint and their amended and supplemental complaint. See 6 C. Wright & A. Miller, § 1497.

Plaintiffs assert, with complete correctness, that both versions of their complaint assert the same breach of contract by defendant Interstate and the continuation of an alleged pattern of unfair representation by the defendant union. Defendants assert, with equal correctness, that the supplemental complaint is the first time that the particular grievance proceeding in issue was challenged by the plaintiffs. Defendants have the better of this argument.

Mitchell counsels that this action is to be viewed primarily as one seeking to vacate the decision of the joint Union-Employer grievance panel. Accordingly, we hold that

each challenged grievance decision constitutes a separate transaction or occurrence, and each alleged breach of the duty of fair representation by the union constitutes separate conduct, for the purposes of applying Rule 15(C). Cf. Blough v. Lamb, 191 F.Supp. 906 (S.D. N.Y., 1961) (claims requiring "proof of independent operative facts . . . and constitut[ing] a separate claim" do not relate back). Accordingly, because the challenged grievance decision occurred more than three months prior to plaintiffs' motion for leave to amend their complaint, (doc. 63), filed September 8, 1977), plaintiffs' seniority-dovetailing claim is barred by the statute of limitations. See Id. (applying date of notice of motion to supplement complaint).

Applying the criteria of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), the Court rejects plaintiffs' argument that the Mitchell

holding is not to be applied retroactively.[3/]

3/ Mitchell has been applied retroactively in the following cases: Sear v. Cadillac Auto Company, 654 F. 2d 4 (1st Cir. 1981) (dictum) Davidson v. Roadway Express, Inc., 650 F.2d 902 (7th Cir. 1981) DelCostello v. Teamsters, 524 F. Supp. 721 (D. Md. 1981); Kikos v. Teamsters, 108 L.R.R.M. 2787 (E.D. Mich. 1981) (action commenced before decision of Smart v. Ellis Trucking Co., 580 F. 2d 215 (6th Cir. 1978); Wright v. Monmouth College, 108 L.R.R.M. 2521 (D. N.J. 1981); Baker v. R.H. Macy & Co., 519 F.Supp. 657 (E.D.N.Y. 1981); Scott v. Chrysler Corp., 107 L.R.R.M. 3086 (E.D. Mich. 1981). The only cases this Court has found that have declined to apply Mitchell retroactively are Singer v. Flying Tiger Line, Inc., 653 F.2d 1349 (9th Cir. 1981)(issue not raised at trial), which was cited by the plaintiff, and Canard v. United Parcel Service, Civil Action No. 81-70156 (E.D. Mich., 1981)(action commenced after decision of Smart v. Ellis Trucking Co., 580 F. 2d 215 (6th Cir. 1978).

At the time each of plaintiffs' complaints was filed, there was no clear past precedent indication ghat a contract statue of limitations would apply to labor cases involving arbitrations.[4/]

4/ Plaintiffs claim to have relied upon a number of cases that applied a long statute of limitations to Section 301 suits. Plaintiffs acknowldege, however, that most of these cases involve either no arbitration or no statute of limitations defense. Such cases are clearly inapposite. The only cases cited by the plaintiffs that did involve both an arbitration and a statute of limitations defense are Smart v. Ellis Trucking Co., 580 F.2d 215 (6th Cir. 1978); Lehto v. Underground Construction Co., 69 Cal. App. 3d 933, 138 Cal. Rptr. 419, 82 Lab. Cas. ¶10,128 (May 20, 1977); Butler v. Teamsters Local 832, 514 F.2d 442 (8th Cir. 1975), cert. denied, 423 U.S. 924 (March 18, 1975). Of these, two were not even decided when plaintiffs filed their amended and supplemental complaint, and the other which was decided nine months to fourteen months after the arbitrations that plaintiffs sought to vacate in their original complaint, did not consider an arbitration statute of limitations. Hill v. Aro Corp., 275 F. Supp. 482, 487 (N.D. Ohio 1967), on the other hand, had decided precisely that the three month limitations period of O.R.C. § 2711.13 or the similar provision of 9 U.S.C. § 12 would be applied in a Section 301 action involving an arbitration.

Indeed, in Hill v. Aro Corp. 275 F.Supp. 482, 487 (N.D. Ohio 1967) the United States District Court for the Northern District of Ohio had held that the three month limitation of O.R.C. § 2711.13 or 9 U.S.C. § 12 would apply to a case such as the one at bar. Furthermore, retroactige application of Mitchell will further the federal labor law policies of "relatively rapid disposition of labor disputes" and of giving finality to arbitration awards upon which the Mitchell decision was based. Prospective application would hinder that policy. Although this case has already proceeded through a lengthy pretrial phase, we believe that any prejudice that may result from dismissing this action at this point in time is outweighed by the advancement of federal labor policy, especially in light of the fact that the Mitchell decision was foreshadowed by the Hill case at the time plaintiffs' arbitrations were decided. The fact that plaintiffs

will be barred from litigating their substantive claims is not dispositive. The Supreme Court itself applied its holding retroactively in Mitchell.

> Since the 'Supreme Court is well aware of how to avoid the effects of applying one of its ruling retroactively,' Cates v. Trans World Airlines, Inc., 561 F.2d 1064, 1073 (2nd Cir. 1977), . . . the declination to do so in Mitchell, . . . suggests that the Supreme Court intended its decision to be applied retroactively in most circumstances.

Kikos v. Teamsters, 106 L.R.R.M. 2787, 2791 (E.D. Mich. 1981) (citations omitted).

Although Mitchell involved the employer by the time it reached the Supreme Court we hold that the same statute of limitations is applicable to the union as well.[5/]

5/ Accord: Sear v. Cadillac Auto Co., 654 F.2d 4 (1st Cir. 1981)(dictum); Delcostello v. Teamsters, 524 F.Supp. 721 (D. Md. 1981); Kikos v. Teamsters, 108 L.R.R.M. 2787 (E.D. Mich. 1981); Scott v. Chrysler Corp., 107 L.R.R.M. 3086 (E.D. Mich. 1981) But see Baker v. R.H. Macy & Co., 519 F.Supp. 657 (E.D. N.Y. 1981).

Ordinarily, the same statute of limitations should apply to both the employer and to the union in a section 301 action. Gallagher v. Chrysler Corp., 613 F.2d 167 (6th Cir. 1980) (Court refused to apply six year statute to employer when only a three year statute applied against the union). Application of a single statute of limitations in this case is also supported by the fact that damages against the union would be limited to attorneys fees, court costs, travel expenses and other costs incidental to plaintiffs' attempts to recover. Lost wages, lost benefits and punitive damages are not recoverable against a union in an unfair representation action pursuant to Section 301. Milstead v. Teamsters Local 957, 649 F.2d 395 (6th Cir.),cert. denied, 108 LLRM 2656 (U.S. 1981). It would be contrary to sound judicial policy to encourage actions to recover only the costs

of litigation where no underlying right can any longer be vindicated in the action. See also Mitchell v. United Parcel Service, 451 U.S. 56 (1981) (Stevens, J. concurring and dissenting in part).

The Court has also considered and rejected plaintiffs' argument that the procedural requirements of O.R.C. §2711.08 must be met before §2711.13 may be applied to an arbitration. In Mitchell itself, the Supreme Court rejected an argument based upon procedural requirements of New York's arbitration statute that would have prevented the employees from bringing a direct suit to vacate the arbitration award under that statute. The Court ruled that the "fact that an employee could not bring a direct suit to vacate an arbitration award, does not mean that his Section 301 claim, which if successful would have the same effect is not 'closely analogous' to such an action."

67 L.Ed. 2d 732,739 n.3. "Obviously the Court intended to borrow the limitations period of the arbitration statute, even if the procedural elements of the arbitration act do not apply to the grievance machinery of a collective bargaining agreement." Brain v. Roadway Express, Inc., Case No. C-80-2338 (N.D. Ohio December 3, 1981). Our jurisdiction is founded not on the arbitration statute, but on Section 301. 29 U.S.C. § 185.

Although defendant's motions are characterized as motions to dismiss, defendants have submitted and the Court has condidered depositions, affidavits and exhibits already of record in this case. Plaintiffs have not disputed the dates of the various arbitrations set forth in those documents. There is no dispute as to any material fact involved in this motion.

Accordingly, judgment is to be entered in favor of defendants on all claims.

United States Senior District Judge

APPENDIX D

3/8/82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM HARKINS, et al., Plaintiffs v. INTERSTATE MOTOR FREIGHT INC., et al., Defendants	Case No.C-1-75-155 MEMORANDUM AND ORDER

PORTER, S.J.:

MEMORANDUM

This matter is presently before the Court on plaintiffs' motion for reconsideration (doc. 180). This motion is the subject of supporting and opposing memoranda (docs. 190-81, 193).

The Court has considered the memoranda submitted in connection with this motion as to which the judgment of the Court has been entered and the opinion and order upon which that judgment was based. Upon

consideration of all of these, the Court finds that plaintiffs' motion is not well taken.

The Court's previous opinion expressly considered plaintiffs' Rule 15(c) argument and held that the heart of this action, for statute of limitations purposes, is the challenge to the individual grievance decision. There can be no action for breach of contract against defendant Interstate Motor Freight Systems unless the relevant grievance decision is first overruled. United Parcel Service v. Mitchell, 451 U.S. 56, 61-62 (1981); See Vaca v. Sipes, 386 U.S. 171, 184-86 (1967). The grievance decision of December 16, 1976 became unassailable on March 16, 1977. It was made a subject of this action no sooner than September 8, 1977. Accordingly, plaintiffs' action as to contract claims that were first raised in that grievance is barred.

As stated in our former opinion, and above, we do not agree with the plaintiffs that notice of one breach of contract that is subject of one grievance is notice of even a related breach that is the subject of yet another grievance. Accordingly, we reject plaintiffs' tolling argument.

Finally, our holding that United Parcel Service v. Mitchell, 451 U.S. 56 (1981) should be applied retroactively was based not only upon lack of reliance by the plaintiffs upon former contrary authority, but equally upon the other criteria of Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Thus, even if plaintiffs could have relied upon cases applying longer statutes of limitation as to defendant Union, plaintiffs' claim of unfair representation remains subject to the ninety (90) day statute of limitations and is barred, for the reasons set forth in our prior opinion.

ORDER

For the foregoing reasons, plaintiffs' motion for reconsideration is denied.

SO ORDERED.

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United States District Judge

APPENDIX E

No. 82-1576
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD A. LaBOND, ET AL., Plaintiffs-Appellants	)	
v.	)	
McLEAN TRUCKING COMPANY Defendant-Appellee	)	ORDER

BEFORE: CONTIE and KRUPANSKY, Circuit Judges; and REED*, District Judge

The defendant-appellee moves this Court to reconsider its order reversing the district court's order which had dismissed plaintiffs' Sec.201 suit for being time-barred by the six-month time period provided in Sec.10(b) of the National Labor Relations Act. The defendant contends that the Supreme Court has recently mandated that the six-month time period

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* The Honorable Scott Reed, District Judge, U.S. District Court for the Eastern District of Kentucky, sitting by designation.

shall be applicable to circumstances like those involved in the instant case. Del Costello v. International Brotherhood of Teamsters, __U.S.__, 51 U.S.L.W. 4693 (June 8, 1983).

As the plaintiffs correctly point out in their response to the defendant's motion to reconsider, the Supreme Court did not decide in DelCostello to give their decision retroactive application; rather, the Supreme Court essentially rendered an opinion in accord with this Court's decision in Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982). Absent a Supreme Court ruling on the issue of retroactivity, it is clear that this Court's decision in Pitts v. Frito-Lay, Inc., 700 F.2d 330 (6th Cir. 1983) to give the Badon decision prospective application only is the controlling law in the instant case.

The defendant's motion to reconsider is, accordingly, denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, Clerk

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

WILLIAM HARKINS, et al.	:	
	:	
Plaintiffs	:	NO. C-1-75-155
	:	
-vs-	:	(Judge Porter)
	:	
INTERSTATE MOTOR FREIGHT SYSTEM, et al.	:	AFFIDAVIT OF HASKELL BAZELL
Defendants	:	

Now comes Haskell Bazell, after being duly cautioned and sworn, and for his affidavit says as follows:

1. I was lead counsel for the Plaintiffs in 1975 when suit was filed and when our amended and supplemental complaint was filed.

2. At those times and during the time I represented Plaintiffs it was my opinion that the Statute of Limitations for 301 suits for breach of contract against the employer was in excess of two years.

3. I knew of no trend of cases or weight of authority holding that suit against Interstate would have to be filed within 90 days or within the period used for suits to vacate an arbitration award.

4. I relied upon my belief that a contract or tort statute of limitations applied in determining when the deadline was for filing claims of Plaintiffs against Interstate.

Haskell Bazell

Sworn to and subscribed in my presence this 18 day of September, 1981.

Notary Public,
State of Ohio